

THE HONORABLE JOHN C. COUGHENOUR

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

ESTHER JONES-ALLEY,

Plaintiff,

v.

MTGLQ INVESTORS, LP and SELENE
FINANCE, LP, a Delaware limited partnership,
doing business as Selene Finance,

Defendants.

CASE NO. C19-0708-JCC

ORDER

This matter comes before the Court on Defendants' motion to dismiss Plaintiff's first amended complaint (Dkt. No. 21) and Defendants' request for judicial notice (Dkt. No. 23). Having thoroughly considered the parties' briefing and the relevant record, the Court finds oral argument unnecessary and hereby GRANTS Defendants' motion to dismiss (Dkt. No. 21) and GRANTS Defendants' request for judicial notice (Dkt. No. 23) for the reasons explained herein.

I. BACKGROUND

In 2006, Plaintiff Esther Jones-Alley received a loan to purchase real property at 12423 SE 252nd Place, Kent, Washington. (*See* Dkt. No. 1 at 1–2.) After Plaintiff received the loan, the deed of trust securing the loan was assigned numerous times, and a variety of successor trustees were appointed. (*Id.* at 3–4.) On March 20, 2019, Quality Loan Service Corporation noticed a trustee foreclosure sale for the property on behalf of Defendant MTGLQ, listing Defendant

1 Selene Finance as servicer of the deed of trust. (Dkt. No. 23-1 at 50–52.) The sale was set for
2 July 26, 2019. (*Id.*)

3 On May 13, 2019, Plaintiff filed this action, alleging that the assignments of the deed of
4 trust were improper or ineffective and asserting various claims. (*See* Dkt. No. 1.) The Court
5 dismissed her original complaint without prejudice and with leave to amend because it failed to
6 state a claim upon which relief could be granted. (*See* Dkt. No. 18.) Plaintiff has filed an
7 amended complaint, once again alleging that it is unclear who currently holds the deed of trust.¹
8 (*See generally* Dkt. No. 20.) She also alleges that someone has mismanaged the processing of her
9 payments, that someone has refused to modify her loan, and that the entities that foreclosed on
10 her property do not hold an interest in the property. (*Id.*) She further alleges that someone has
11 refused to provide her with information about the loan or to answer her questions about when the
12 default occurred. (Dkt. No. 24 at 2.) She brings claims for (1) breach of contract, (2) breach of
13 the duty of good faith and fair dealing, (3) violations of the Deed of Trust Act, Wash. Rev. Code.
14 § 61.24.030, and (4) “lack of standing wrongful foreclosure.” (Dkt. No. 20 at 2–12.) She requests
15 \$500,000 in damages and asks the Court to order Defendants to grant her a 30-year loan at a
16 fixed interest rate of 0.01%, “a loan that she can afford.” (*Id.* at 13.) Defendants now move to
17 dismiss Plaintiff’s first amended complaint, arguing that the complaint was not timely filed, that
18 Plaintiff’s claims are precluded by her prior lawsuit, and that Plaintiff fails to state a plausible
19 cause of action. (*See generally* Dkt. No. 21.)
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23 ¹ On July 30, 2019, the Court granted Plaintiff leave to amend her complaint and ordered
24 her to file an amended complaint no later than 21 days after the order was issued. (Dkt. No. 18 at
25 5.) Plaintiff filed an amended complaint on August 23, 2019, three days after the deadline. (Dkt.
26 No. 20.) Plaintiff believed that because she received the Court’s order by mail, Federal Rule of
Civil Procedure 6(d) permits her three additional days to comply with the Court-ordered
deadline. (Dkt. No. 24 at 1–2.) Because Plaintiff is proceeding *pro se* and she provided an
explanation for her mistake, the Court shall construe the amended complaint as timely filed.

II. DISCUSSION

A. Federal Rule of Civil Procedure 12(b)(6) Legal Standard

A defendant may move for dismissal when a plaintiff “fails to state a claim upon which relief can be granted.” Fed. R. Civ. P. 12(b)(6). To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim for relief that is plausible on its face. *Ashcroft v. Iqbal*, 556 U.S. 662, 677–78 (2009). A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. *Id.* at 678. Although the Court must accept as true a complaint’s well-pleaded facts, conclusory allegations of law and unwarranted inferences will not defeat an otherwise proper Rule 12(b)(6) motion. *Vasquez v. Los Angeles County*, 487 F.3d 1246, 1249 (9th Cir. 2007); *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001). The plaintiff is obligated to provide grounds for her entitlement to relief that amount to more than labels and conclusions or a formulaic recitation of the elements of a cause of action. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 545 (2007). “[T]he pleading standard Rule 8 announces does not require ‘detailed factual allegations,’ but it demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation.” *Iqbal*, 556 U.S. at 678. *Pro se* plaintiffs “must be held to less stringent standards than formal pleadings drafted by lawyers.” *Hebbe v. Pliler*, 627 F.3d 338, 342 (9th Cir. 2010).

B. Judicial Notice

When ruling on a motion to dismiss for failure to state a claim, the Court may consider the complaint, documents attached to the complaint, documents incorporated by reference in the complaint, and matters that are subject to judicial notice. *U.S. v. Ritchie*, 342 F.3d 903, 907–08 (9th Cir. 2003); Fed. R. Evid. 201. Defendants ask the Court to take judicial notice of the deed of trust on Plaintiff’s property and documents evidencing subsequent assignments of the deed of trust recorded in King County, Washington. (Dkt. No. 21 at 3–4, 12.) These documents are referenced extensively in Plaintiff’s amended complaint and form the basis of the complaint. *See*

1 *Ritchie*, 342 F.3d 903, 907–08. Furthermore, the accuracy of the exhibits is capable of
2 verification from sources whose accuracy cannot reasonably be questioned. *See* Fed. R. Evid.
3 201(a)–(b). Therefore, Defendants’ request for judicial notice (Dkt. No. 23) is GRANTED. The
4 Court hereby takes judicial notice of the exhibits contained in Docket Number 23-1.

5 **C. Breach of Contract**

6 “A breach of contract is actionable only if the contract imposes a duty, the duty is
7 breached, and the breach proximately causes damage to the claimant.” *Nw. Indep. Forest Mfrs. v.*
8 *Dep’t of Labor & Indus.*, 899 P.2d 6, 9 (Wash. Ct. App. 1995). Plaintiff alleges that Defendants
9 are bound by the deed of trust on Plaintiff’s property. (Dkt. No. 20 at 6.)² Defendant MTGLQ
10 agrees that it is a party to the deed of trust. (*See* Dkt. No. 21 at 12.) But Defendant Selene
11 Finance is not a party to the deed of trust. (*See* Dkt. Nos. 20 at 7, 23-1 at 45.) Thus, Defendant
12 Selene Finance cannot be liable for breach of the deed of trust. *See Nw. Indep. Forest Mfrs.*, 899
13 P.2d at 9. Therefore, Plaintiff’s breach of contract claim is DISMISSED as to Defendant Selene
14 Finance.

15 Plaintiff alleges that Defendants violated section 22 of the deed of trust when they failed
16 to provide her notice of default and an explanation of how to cure the default. (Dkt. No. 20 at 7–
17 8.) She further alleges that Defendants failed to notify her of her right to reinstate after
18 acceleration or her right to bring a court action. (*Id.* at 8.) But she alleges no details as to the
19 circumstances surrounding her default, Defendants’ acceleration of the loan, and Defendants’
20 foreclosure of her property. (*Id.*) Thus, her conclusory allegations do not plead sufficient factual
21 content to state a plausible claim for breach of contract. *See Iqbal*, 556 U.S. at 677–78.

22 Additionally, Plaintiff alleges that Defendants breached the deed of trust by failing to properly
23 service her escrow account and by failing to properly credit her payments. (Dkt. No. 20 at 8; 24

24 ² Plaintiff also alleges that someone, presumably one of the original parties to the deed of
25 trust, violated section 17 of the deed of trust by failing to provide her a copy of the note and deed
26 of trust. (Dkt. No. 20 at 7.) But she does not allege that Defendants are liable for that breach.
(*See id.*)

1 at 17.) But again, she provides no details beyond her bare allegation, such as when she made
2 payments, to whom she made payments, or how she learned the payments were not credited. (*See*
3 *id.*) Thus, Plaintiff fails to state a plausible claim for breach of contract against Defendant
4 MTGLQ. *See Iqbal*, 556 U.S. at 677–78. Therefore, Defendants’ motion is GRANTED and
5 Plaintiff’s claim for breach of contract against Defendant MTGLQ is DISMISSED.

6 **D. Breach of Duty of Good Faith and Fair Dealing**

7 The duty of good faith and fair dealing exists only in relation to performance of a specific
8 contract term. *See Badgett v. Sec. State Bank*, 807 P.2d 356, 360–61 (Wash. 1991). Thus, to state
9 a plausible claim for relief, Plaintiff must allege that some aspect of Defendants’ performance of
10 their contractual obligations breached the duty of good faith and fair dealing. *See id.* Plaintiff
11 vaguely alleges that Defendant MTGLQ allowed Defendant Selene Finance to “mismanage” her
12 loan and escrow account, but she does not state how. (Dkt. No. 20 at 9.) She does not allege how
13 the deed of trust required Defendants to manage her loan or how Defendants’ mismanagement of
14 her loan and escrow account relate to any provision in the deed of trust. (*See id.*) Nor does she
15 allege how she was harmed. (*Id.*) Moreover, as the Court noted above, Plaintiff does not allege
16 facts demonstrating that any contract existed between Plaintiff and Defendant Selene Finance.
17 (*Id.*) Thus, Plaintiff fails to state a plausible claim that Defendants breached a duty of good faith
18 and fair dealing. *See Badgett*, 807 P.2d at 360–61. Therefore, Defendants’ motion is GRANTED
19 and Plaintiff’s claim for breach of the duty of good faith and fair dealing is DISMISSED.

20 **E. Deed of Trust Act**

21 Under Washington law, only a properly appointed successor trustee may conduct a
22 foreclosure sale. *See Wash. Rev. Code. § 61.24.030; Bavand v. OneWest Bank, F.S.B.*, 309 P.3d
23 636, 640 (Wash. Ct. App. 2013.)

24 Plaintiff alleges that Defendant MTGLQ was not properly assigned the deed of trust, that
25 Defendant Selene Finance was not properly appointed as trustee, and that Defendants’ 2019
26 foreclosure sale of her property was invalid. (Dkt. No. 20 at 10.) Plaintiff specifically alleges

1 there were flaws in Mortgage Electronic Registration Systems, Inc.’s (“MERS”) assignments of
2 the deed of trust and the appointment of Trustee Corps as successor trustee. (*Id.* at 10–11.)
3 Defendants argue that the record conclusively shows that Defendant MTGLQ was properly
4 assigned the deed of trust and that Quality Loan Service Corporation was appointed as the
5 successor trustee. (Dkt. No. 21 at 14.) In response, Plaintiff contends that every assignment of
6 the deed of trust either has been rescinded or is void, and therefore Defendants have no interest
7 in her property. (Dkt. No. 24 at 3.)

8 Defendants argue that *res judicata* precludes Plaintiff from bringing this claim. (Dkt. No. 21
9 at 10–11.) When a district court sits in diversity, it applies the forum state’s law to determine the
10 preclusive effect of a state court judgment. *Semtek Int’l Inc. v. Lockheed Martin Corp.*, 531 U.S. 497,
11 508 (2001). Under Washington law, the doctrine of *res judicata* bars a party from litigating claims
12 that either were, or should have been, litigated in a prior action. *Ensley v. Pitcher*, 222 P.3d 99, 102
13 (Wash. Ct. App. 2009) (citing *Landry v. Luscher*, 976 P.2d 1274, 1276 (Wash. Ct. App. 1999)).
14 Application of *res judicata* under Washington law requires identity between a prior judgment
15 and a subsequent action as to (1) persons and parties, (2) causes of action, (3) subject matter, and
16 (4) the quality of persons for or against whom the claim is made. *Id.* at 104–08. *Res judicata* also
17 requires a final judgment on the merits. *Id.* at 103. “A dismissal with prejudice constitutes a final
18 judgment on the merits.” *Hisle v. Todd Pac. Shipyards Corp.*, 93 P.3d 108, 115 (Wash. 2004).
19 Once the party asserting *res judicata* has met its burden of establishing these elements, all
20 matters that were considered, or could have been considered, in the prior action are barred. *See*
21 *Ensley*, 222 P.3d at 102.

22 To determine whether the same causes of action are asserted in successive lawsuits,
23 courts consider: “(1) whether the rights or interests established in the prior judgment would be
24 destroyed or impaired by the prosecution of the second action; (2) whether substantially the same
25 evidence is presented in the two actions; (3) whether the suits involved infringement of the same
26 right; and (4) whether the two suits arise out of the same transactional nucleus of facts.” *Id.* at

1 104–05. These factors are “analytical tools,” none of which must be present to apply *res judicata*.
2 *Id.* at 105. The final consideration—whether the two suits arise from the same transactional
3 nucleus of facts—is “the most important” consideration in determining whether the causes of
4 action are identical. *Constantini v. Trans World Airlines*, 681 F.2d 1199, 1202 (9th Cir. 1982).

5 On November 18, 2016, Plaintiff sued First Independent Mortgage Company (Plaintiff’s
6 original lender), MERS (the original holder of the deed of trust), Bank of America (the
7 subsequent holder of the deed of trust), Defendant Selene Finance (a loan servicer), and several
8 other defendants for claims arising from the same note and deed of trust. *Alley v. Carrington*
9 *Mortgage Servs. LLC*, Case No. C16-1796-RAJ, Dkt. Nos. 3, 10 (W.D. Wash. 2016). Plaintiff
10 alleged that the assignments of the deed of trust from MERS to Bank of America and other
11 subsequent holders of the deed of trust were improper, and therefore no one held a deed of trust
12 on her property. *Id.* She requested the court declare the deed of trust void, cancel her debt, and
13 award her monetary and punitive damages of \$995,000. *Id.*, Dkt. Nos. 3 at 5, 10 at 14. Plaintiff
14 brought claims for fraud, negligence, and misrepresentation. *Id.*, Dkt. No. 10 at 5–6. After
15 allowing Plaintiff to amend her complaint once, the Honorable Richard A. Jones, United States
16 District Judge, dismissed the action with prejudice. *Id.*, Dkt. Nos. 19, 26, 27.

17 All the elements of *res judicata* are present here. First, Defendant Selene Finance was a
18 party to Plaintiff’s prior lawsuit, and Defendant MTGLQ is in privity with MERS and Bank of
19 America, Defendant MTGLQ’s predecessors in interest to the deed of trust. (*See* Dkt. No. 23-1 at
20 2, 32, 37, 40, 43, 45.) Thus, there is identity as to persons and parties in the two suits. *See*
21 *Karlberg*, 280 P.3d at 1130. Second, Plaintiff’s prior claims derive from the same transaction or
22 series of transactions: the allegedly improper assignment of the deed of trust from MERS to
23 Bank of America and its subsequent assignees. *Compare Alley*, Case No. C16-1796-RAJ, Dkt.
24 No. 10 at 5–6, 14–15 *with* (Dkt. No. 20 at 3–12). Substantially the same evidence is at issue in
25 both actions—the documents recording the chain of assignments of the deed of trust on
26 Plaintiff’s property. *Id.* Furthermore, because Defendant Selene Finance established in the prior

1 suit that it is not liable for claims arising from assignments of the deed of trust, allowing Plaintiff
2 to proceed with her Deed of Trust Act claim would impair the rights Defendant Selene Finance
3 established in the prior case. *See Alley*, Case No. C16-1796-RAJ, Dkt. No. 19. Thus, there is
4 there is identity as to causes of action. *See Ensley*, 222 P.3d at 104–05.

5 Third, the present case and the prior action share essentially the same subject matter.
6 Plaintiff’s underlying allegation in both cases is that Defendants’ interest in the property is void
7 and therefore Defendants may not take any action to impair her interest in the property. Thus,
8 there is identity as to subject matter. *See Landry*, 976 P.2d at 1278. Fourth, there is identity as to
9 the quality of persons for or against whom the claim is made because Plaintiff and the prior
10 defendants, like here, were adverse parties. *See Karlberg*, 280 P.3d at 1130; *Bordeaux v.*
11 *Ingersoll Rand Co.*, 429 P.2d 207, 211 (Wash. 1967). Finally, there was a final judgment on the
12 merits because the prior lawsuit was dismissed with prejudice. *See Hisle*, 93 P.3d at 115; *Alley*,
13 Case No. C16-1796-RAJ, Dkt. Nos. 19, 26, 27. Therefore, Plaintiff’s Deed of Trust claim is
14 barred by *res judicata*.³ *See Ensley*, 222 P.3d at 102. Accordingly, Defendants’ motion to
15 dismiss is GRANTED and Plaintiff’s Deed of Trust claim is hereby DISMISSED.

16 **F. Lack of Standing Wrongful Foreclosure**

17 Plaintiff’s complaint includes a claim for “lack of standing wrongful foreclosure” but the
18 legal basis for her claim is unclear. (Dkt. No. 20 at 12.) Plaintiff’s only allegation in support of
19 this claim is that Defendants “lacked standing to foreclose,” apparently based on her other
20 allegations that MERS never properly assigned the deed of trust. (*See id.*) Plaintiff does not cite
21 case law demonstrating there is a separate cause of action in Washington for wrongful
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23 ³ The Court notes that Plaintiff’s Deed of Trust claim would also fail because she has not
24 stated a plausible claim for relief. Plaintiff’s specific factual allegations fail to adequately support
25 her claim. She makes bare and conclusory allegations that MERS’s initial assignment of the deed
26 of trust was improper, Defendant Selene Finance was never properly appointed, and Defendant
MTGLQ was never properly assigned. (*See* Dkt. No. 20 at 10–11.) These allegations are not
sufficient to state a viable claim for violations of the Deed of Trust Act. *See Iqbal*, 556 U.S. at
677–78; Wash. Rev. Code. § 61.24.030.

1 foreclosure beyond the remedies permitted by the Deed of Trust Act. (*See id.*) It is not clear that
2 such an independent cause of action exists.⁴ *See Frias v. Asset Foreclosure Servs.*, 334 P.3d 529,
3 533 (Wash. 2014); *Hummel v. Nw. Tr. Servs., Inc.*, 180 F. Supp. 3d 798, 805, Case No. C15-
4 0255-RAJ, Dkt. No. 87 (W.D. Wash. 2016), *aff'd*, 740 F. App'x 142 (9th Cir. 2018). Thus,
5 Plaintiff's complaint does not establish a plausible cause of action for this claim. *See Iqbal*, 556
6 U.S. at 678. Therefore, Defendant's motion to discuss this claim is GRANTED and Plaintiff's
7 claim for lack of standing wrongful foreclosure is DISMISSED.

8 **III. CONCLUSION**

9 For the foregoing reasons, Defendants' request for judicial notice (Dkt. No. 23) is
10 GRANTED. Defendants' motion to dismiss (Dkt. No. 21) is GRANTED. Plaintiff's complaint is
11 DISMISSED with prejudice.

12 DATED this 28th day of January 2020.

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John C. Coughenour
UNITED STATES DISTRICT JUDGE

⁴ Even assuming for the sake of argument that this cause of action exists, Plaintiff's prior lawsuit would bar recovery for claims deriving from MERS's assignments of the deed of trust. *See Alley*, Case No. C16-1796-RAJ, Dkt. Nos. 19, 26, 27 (dismissing Plaintiff's prior lawsuit with prejudice); *Ensley*, 222 P.3d 102 (describing the preclusive effect of *res judicata*).